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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Subject Index.

	Page
Petition	1
Summary statement of matter involved	1
Reasons relied on for the allowance of the writ	3
Brief	5
Opinions	5
Jurisdiction	5
Facts	6
Questions presented	6
Argument:	
I. The decision of the Circuit Court of Appeals herein conflicts with an earlier decision of this Court	7
II. The authority of United States Attorneys to act for the United States should be determined by this Court	10
Conclusion	11

Cases Cited.

Bennett Day Importing Company v. U. S., 8 F. (2d) 83	9
Everett Rwy. Co. v. *U. S.*, 236 Fed. 806	10
Farrar & Brown v. *U. S.*, 3 Pet. 459	4
Law v. *U. S.*, 266 U. S. 494	8
Lynch v. *U. S.*, 292 U. S. 571, 54 Sup. Ct. 78	4
Mill Creek Navigation & R. R. Co. v. *U. S.*, 246 Fed. 1013, aff'd 251 U. S. 539	3, 9
Miller v. *U. S.*, 13 Fed. Supp. 684	9
United States v. *Ellison*, 74 F. (2d) 864, Cert. denied, 295 U. S. 750	9
United States v. *Hvoslef*, 237 U. S. 1	9
United States v. *Larkin*, 208 U. S. 333	9
United States v. *N. Y. & O. Steamship Co.*, 216 Fed. 61	9

Statutes Cited.

28 U. S. C. A., Sec. 347 (Judicial Code)	5
28 U. S. C. A., Secs. 762, 763 (Tucker Act)	3, 7
38 U. S. C. A., Sec. 445 (World War Veterans' Act)	7, 11
28 U. S. C. A., Sec. 724 (Conformity Act)	3, 8
Rule 1, Common Law Rules of the District Court of the United States for the Western District of New York	8

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Leo N. Munro respectfully shows:

A.

Summary Statement of Matter Involved.

This is an action upon a policy of war risk insurance under which your petitioner claims indemnity for total and permanent disability. The judgment of the United States District Court for the Western District of New York, in favor of your petitioner (R. 35), has been reversed by the

United States Circuit Court of Appeals for the Second Circuit (R. 53), upon the ground that this action was not brought within the time limited therefor by Act of Congress (R. 48-52).

It is not disputed that this action should have been commenced on or before July 1, 1933. On March 16, 1933, petitioner caused a summons to be issued by the Clerk of the District Court at Buffalo, which summons was entitled in this action and, on the same day, was served upon the United States Attorney at Buffalo and the United States Attorney General, Department of Justice, Washington, D. C. (R. 5). This practice was adopted upon the specific instructions of an Assistant United States Attorney at Buffalo (R. 23). Thereafter the respondent failed to appear in the action and, upon inquiry, counsel for your petitioner was assured that due service of the complaint would be admitted by the respondent (R. 25). The complaint herein was served July 26, 1933, and an admission of due service was endorsed thereon by the United States Attorney at Buffalo (R. 12).

On February 16, 1934, respondent served an answer denying the allegations of petitioner's complaint, and setting up no affirmative defenses (R. 12). On November 16, 1934, respondent moved to dismiss the complaint upon the ground that the action was barred by the statute of limitations (R. 13). The motion was denied by the Hon. Harlan W. Rippey, one of the Judges of the United States District Court for the Western District of New York (Opinion R. 31, Order R. 34). The action was brought to trial before the Hon. John Knight, Judge of the District Court, and a jury, on April 9, 1936 (R. 20). The respondent's motions upon the trial for dismissal of the complaint upon the ground that suit was not commenced within the time limited therefor were denied (R. 30), and a judgment in

favor of your petitioner based upon the verdict of the jury was entered July 17, 1936 (R. 35).

The respondent appealed from the judgment of the District Court to the Circuit Court of Appeals for the Second Circuit, and the Court of Appeals reversed the judgment below (R. 53), holding that the action was not timely brought and that the delay was not waived by the respondent (R. 48-52).

B.

Reasons Relied on for the Allowance of the Writ.

(1) In holding that an action against the United States under the Tucker Act (28 U. S. C. A. Sec. 762) cannot be commenced by the service of a summons, the Circuit Court of Appeals decided an important Federal question probably not in accord with the decision of this Court in *United States* v. *Mill Creek and Mine Hill Navigation & R. R. Co.*, 251 U. S. 539, 40 Supreme Court 118, 64 L. Ed. 404.

(2) The lower courts are not in agreement as to the propriety of commencing an action such as this by the service of a summons. The Circuit Court, in its opinion, notes that "The authorities are in some confusion" (R. 50). The conflict, real or apparent, between the *Mill Creek* case and the decision below in this case should be resolved by this Court.

(3) The applicability of the Conformity Act (28 U. S. C. A. Sec. 724) to suits against the United States to enforce contractual rights, constitutes an important question of Federal law which has not been, but should be, settled by this Court.

(4) The opinion of the Circuit Court of Appeals in this case discloses a logical conflict between the theories upon which its decision is based, for it is held, first, that the

Mill Creek case is not controlling here because that case merely decided that the District Court had jurisdiction of the action brought by service of a summons (R. 51-52) and, second, that the United States Attorney in this action could not waive the irregularity in petitioner's procedure because the time limitation contained in the statute was a condition upon the court's jurisdiction.

(5) Whether, in an action brought subject to the procedural requirements of the Tucker Act, the service of a summons is a defect in process subject to cure by a general appearance under the rule of *Farrar & Brown* v. *U. S.*, 3 Pet. 459, 7 L. Ed. 741, is an important question of Federal law which has not, but should be, settled by this Court.

(6) In this action upon a contract entered into by the United States for a money consideration, the Circuit Court of Appeals has held that the conduct of respondent's judicial officers, in representing to petitioner's counsel that this action was properly commenced by the service of a summons, by failing to move against petitioner's process until after the period of limitations had run, by admitting due service of petitioner's complaint and by answering to the merits of petitioner's cause of action did not and could not estop the respondent from setting up the defense of the statute of limitations. This application of the doctrine of sovereign immunity is contrary, at least in principle, to the decision of this Court in *Lynch* against *U. S.*, 292 U. S. 571, 54 Supreme Court 78.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit in this action.

LEO N. MUNRO,
Petitioner,
GEORGE CLINTON, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions.

One opinion herein was delivered by the District Court. It is that of the Hon. Harlan W. Rippey accompanying his denial of the respondent's motion for a dismissal of the complaint before trial. It is reported in 10 Fed. Supp. at page 412 and appears in the record at page 31. The opinion of the Circuit Court of Appeals, Judge Swan writing, Judges L. Hand and A. Hand concurring, is reported in 89 Fed. Rep., 2nd Series, at page 614 and appears at page 48 in the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347).

Facts.

The facts are stated in the petition hereinabove, at page 1. The attention of the Court is respectfully directed to some circumstances of peculiar importance:

(a) Petitioner's summons was served some three months before the statute of limitations ran against his claim.

(b) The respondent did not move against the summons herein during the period within which a new action might have been brought by the petitioner, nor until more than a year after service of the complaint.

(c) Petitioner's attorney was orally assured by a judicial officer of the respondent that the practice adopted by petitioner was proper and sufficient to give the District Court jurisdiction.

(d) The respondent, by its attorney, admitted due service of the complaint.

(e) Respondent's answer, served more than six months after the complaint, and almost a year after the summons, consisted solely of a general denial of the allegations of petitioner's complaint.

Questions Presented.

1. Whether an action against the United States upon a policy of war risk insurance can be commenced in the United States District Court for the Western District of New York by the service of a summons.

2. Whether the irregularities in petitioner's procedure or his delay in bringing suit have been waived by the respondent.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals herein conflicts with an earlier decision of this Court.

This action was brought under the authority of the World War Veterans' Act, Section 19 (38 U. S. C. A., Sec. 445), which reads in part, as follows:

> "In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable."

The foregoing *confers jurisdiction* upon the District courts to entertain actions such as this, and provides that the *procedure* therein shall accord with the Tucker Act (28 U. S. C. A. Sec. 762), so far as applicable, which reads:

> "Petition in suit against United States. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

The word "petition" in the Tucker Act does not establish that this action is a proceeding in equity; it is, in fact, an action at law.

Law v. *U. S.*, 266 U. S. 494.

The Conformity Act (28 U. S. C. A., Sec. 724) provides:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

Rule 1, of the Common Law Rules of the United States District Court for the Western District of New York provides:

> "Process. A summons substantially in the form prescribed and ordered by the law and practice now or hereafter regulating the Supreme Court of the State of New York shall constitute the proper process in all suits in common law to require the defendant to appear and answer the complaint;"

The foregoing rule of the District Court follows the practice in the courts of the State of New York, and is obviously intended to comply with the Conformity Act. After the service of the summons, in State practice, the defendant having given notice of appearance, the plaintiff serves a complaint stating the facts upon which his claim is based. The analogy between that practice, which obtains in the U. S. District Court for the Western District of New York, and the provisions of the statute forming the basis for this action, is obvious. The Congress authorized an action at law against the United States in the District Court, and specified that, so far as applicable, the Tucker Act should control the procedure. The Tucker Act provides that "in any suit brought" the plaintiff shall

file and serve a petition setting forth a "statement of the facts upon which the claim is based". The Act does not require that the suit be brought by petition, it does not refer to the commencement of the action, but simply calls for the filing and service of a petition "in any suit brought". Is it not a compliance with all of the pertinent statutes to commence such an action as this by summons pursuant to the general practice in the District Court, and file a petition in the action complying with the terms of the Tucker Act? It has been so held.

Mill Creek Navigation & R. R. Co. v. *U. S.*, 246 Fed. 1013, Aff'd 251 U. S. 539;
Bennett Day Importing Co. v. *U. S.*, 8 F. (2d) 83;
Miller v. *U. S.*, 13 Fed. Supp. 684.

It is no answer to the foregoing contention to say that no provision of the New York Civil Practice Act specifies a method for commencing an action against the United States. Congress has authorized suit against the United States, and local practice in the conduct of the suit must be invoked by analogy. Does the New York Practice Act prescribe the method of empanelling a jury, or swearing a witness in an action against the United States?

The Circuit Court, in its opinion herein, declined to follow the cases above cited, and approved several decisions of District Courts holding, more or less directly, to the contrary. The affirmance by this Court of the *Mill Creek* case was held not to be controlling because this Court based its affirmance upon the case of *U. S.* v. *Larkin*, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517, in which the District Court's jurisdiction alone was passed upon and approved. The petitioner asks no more. An attorney for the United States may waive defects and irregularities in procedure not affecting the jurisdiction of the court (*U. S.* v. *Hvoslef*, 237 U. S. 1; *Farrar & Brown* v. *U. S.*, 3 Pet. 459; *U. S.* v. *N. Y. & O. Steamship Co.*, 216 Fed. 61;

Everett Rwy. Co. v. *U. S.*, 236 Fed. 806). This the Circuit Court conceded in the latter portion of its opinion, in which the finding that the District Attorney in this case lacked authority to waive the statute of limitations was based squarely upon the argument that the time limitations was a condition upon the Court's jurisdiction. The ultimate conclusion of the Circuit Court was that the District Court lacked jurisdiction, a conclusion contrary to the decision of this Court in the *Mill Creek* case.

II.

The authority of United States attorneys to act for the United States should be determined by this Court.

The finding of the Circuit Court that respondent had not waived and was not estopped from asserting as a defense the irregularity in petitioner's procedure was based solely upon the jurisdictional character of the time limitation upon suit. Every element of implied waiver and equitable estoppel is to be found in the conduct of the case by the attorneys for the respondent, but the Court held that judicial officers of the United States have no authority, express or implied, to waive the defense or abrogate it by estoppel. This, although petitioner's attorney was misled by assurances made by an Assistant District Attorney *before the defense came into existence.* It would seem that a distinction might properly be drawn between conduct on the part of counsel which induces the opposition to believe that an existing defense will not be raised, and conduct which induces a litigant so to act as to create a defense to his cause of action.

The Court's attention is respectfully directed to the fact that the Circuit Court's ruling is made up of two conclusions; first, that under the Tucker Act suits of this nature must be brought by the service of a petition, a requirement not fulfilled by petitioner until after his time to sue had been exhausted, and second, that respondent's

attorney could not waive the time limitation. It does not appear from the opinion that the court below considered the effect of the District Attorney's admissions and representations upon the requirement that suit be begun by petition. Certainly the provisions of the Tucker Act are not in their nature jurisdictional; in fact, the Congress has expressly referred to them as procedural (Sec. 19 World War Veterans' Act, 38 U. S. C. A., Sec. 445). Petitioner's original process was timely served, but his choice of process was erroneous. Was not that defect cured by respondent's appearance? A procedural error should not be made fatal to petitioner's case simply because the bar of the statute of limitations fell before respondent's formal appearance in the action. If there is any reason to hold that defects in process may ever be waived, the compelling force thereof is immeasurably increased when insistence upon the technicality will work a forfeiture. If the respondent had moved to quash petitioner's summons, a new action could have been brought. The effect of the decision below is to place a tremendous premium on respondent's laches.

Conclusion.

It is respectfully submitted that the questions of law presented herein are of great importance not only because of the sums of money involved in this and similar actions, but also because of the frequency with which these questions have arisen and will in the future arise. The entrance of the Government into business pursuits necessitates a review of those sovereign immunities which can create, and in this instance have created, an inequality of rights between contracting parties.

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